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IN THE

Supreme Court of the United States

OCTOBER TERM 1950

No. 505

MICHAEL OBERMEIER,

Petitioner,

against

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND SUPPORTING BRIEF

SIDNEY E. COHN,
PAUL O'DWYER,
Counsel for Petitioner,
1776 Broadway,
Borough of Manhattan,
New York City, N. Y.

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UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Michael Obermeier, respectfully prays that a writ of certiorari issue to review so much of the decision of the United States Court of Appeals for the Second Circuit rendered in the above entitled action, and the judgment entered thereon in the Office of the Clerk of said Court, as affirms the conviction of petitioner upon the third count of the indictment against him in said action.

A

Statement of the Matter Involved *

On September 28, 1948 petitioner was indicted on three counts, each of which charged him with the crime of making

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* Figures in parentheses, unless otherwise noted, refer to pages of the record.

a false statement under oath in a matter relating to naturalization and citizenship (2, 7-8). The third count reads as follows (8):

> "That on or about the 6th day of June, 1946, within the Eastern District of New York, the defendant, Michael Obermeier, did knowingly make a false statement under oath in a matter relating to naturalization and citizenship, to wit: While being orally examined and questioned under oath by a United States Naturalization Examiner, did falsely state to said examiner that he, the defendant, had not at any time been a member of the Communist Party (Title 8, United States Code, Section 746(a)(1))."

The first and second counts were identical with the third, except that the dates of the offenses alleged in those counts are May 26, 1945 and June 2, 1945, respectively (7-8).

Petitioner waived trial by jury (9-10) and was tried in the United States District Court for the Eastern District of New York before Hon. Robert A. Inch without a jury. Upon the trial it was stipulated that petitioner had been a member of the Communist Party from 1930 to January 1, 1939 (190-191, 12). In respect to the first two counts, petitioner contended that they were barred by the statute of limitations. In respect to the third count, petitioner contended that there was no legal authority for the administration of the oath alleged in that count and that the Government had failed to prove petitioner's guilt beyond a reasonable doubt.

Judge Inch found petitioner guilty on all three counts (180, 230-238) and sentenced him to two years' imprisonment on each count and a fine of $1,000 on the first count, the prison sentences to run concurrently (4, 188).

The United States Court of Appeals for the Second Circuit reversed petitioner's conviction upon Counts One and Two on the ground that prosecution upon those counts was barred by the statute of limitations (257-270, 271). It affirmed his conviction upon Count Three (248-256, 271).

On January 2, 1951, the Court of Appeals granted petitioner a stay of the mandate and a continuance of bail pending application to this Court for a writ of certiorari. Two of the Judges who joined in granting the stay and continuance of bail were Chief Judge Learned Hand and Associate Judge Swan, both of whom heard the original appeal.

B

The Jurisdiction of This Court

Petitioner seeks review by certiorari pursuant to Title 28, United States Code, Section 1254. The date of the decision and judgment sought to be reviewed is December 20, 1950.

C

The Statute Involved

The statute involved is the Nationality Act of 1940, as amended, Title 8, United States Code, Sections 501 et seq. The relevant sections of the statute are 8 U. S. C. Sections 724, 727, 731, 732 and 733. The pertinent portions of those sections are set forth in Appendix A to the brief in support of this petition.

D

Petitioner's Background

Petitioner, fifty-eight years of age, was born in Germany. He entered the United States as an alien in 1914 and was admitted lawfully for permanent residence in 1923. Since then, he has resided continuously in the United States, except for two temporary visits abroad (190-191).

He is married and is the father of two American-born children (113-114). His son served honorably in the United States Marines during the last war (114, 131); his daughter is a Research Fellow in the Biology Department of Cali-

fornia Institute of Technology and is married to an American-born citizen who also served in the armed forces of the United States (131).

For the greater part of his life the petitioner engaged in trade union activities (203-207) and for the past eight years was president of the Hotel and Club Employees Union, affiliated with the American Federation of Labor (118, 190). He was also on the board of directors of the New York Hotel Trades Council which represents a number of unions in dealing with employers in the hotel industry of the City of New York (108-110).

The petitioner has never before been convicted or even arrested for a crime (214). His excellent reputation in the hotel industry as well as in labor circles was attested to by many responsible citizens (104-134). The testimony of one of them, Robert K. Christenberry, is worthy of particular attention. Mr. Christenberry is president of the Hotel Astor, a director of the Ritz-Carlton Hotel, and a member of the Board of Governors of the Hotel Association of New York City (104). He testified:

> "Q. Can you tell us what his reputation is generally? A. He enjoys a reputation for veracity. As a matter of fact I have never heard of a man whose word I would accept more readily. I have never known a man in labor circles whose word I would value more highly." (108)

E

The Facts

The perjury alleged in Count Three of the indictment is claimed to have been committed during a preliminary examination in naturalization proceedings at a time when this petitioner was an applicant for naturalization (68-69). He had filed an application known as Form N-400, entitled "Application for a Certificate of Arrival and Preliminary Form for Petition for Naturalization" (75, 82, 227). He had not at the time of said examination filed the petition

for naturalization provided for by 8 U. S. C. Section 732 (69).

The preliminary examination in question was admittedly (68-69, 238, 249-250) not a preliminary hearing as specifically provided for by 8 U. S. C. Section 733, which is to be held *after* the filing of a petition. It was a prepetition examination held pursuant to a departmental regulation (8 C. F. R. Sec. 370.8) (68-69, 238, 249-250).

The examination in question was oral and was not conducted in the presence of a stenographer; no official record was made of the administration of an oath, nor were the questions and answers reduced to writing (78-80).

The sole evidence adduced by the Government to prove the administration of the oath and the making of the alleged false statement was the testimony of the preliminary examiner, one Louis M. Dillon. On direct examination Mr. Dillon testified that on June 6, 1946, petitioner was "put under oath" and that in the course of the examination petitioner was asked whether he was ever a member of the Communist Party, to which question he gave the answer "No" (64-65). On cross-examination Mr. Dillon admitted that his testimony that petitioner had made the false statement in question was his "interpretation" or "conclusion" as to the meaning of petitioner's "lengthy explanations" (72-74). He also admitted that he had no distinct recollection as to whether he administered an oath but that he believed he did so because that was his practice in every case (79-80).

F

Questions Presented

The questions presented in this case and of which review is sought by this petition are:

1. Was there statutory authority for the administration of the oath alleged in Count Three of the indictment upon which petitioner's conviction is based?

2. Is the evidence sufficient in law to establish that petitioner made a false statement or that, if he did, he was under oath?

C

Reason Relied on for the Allowance of the Writ

This case presents an important and novel question of the construction of the Nationality Act of 1940. That question is: Since Congress has specifically prescribed by statute *one* examination in which an alien seeking citizenship is required to testify under oath with respect to his qualifications, does the Commissioner of Immigration and Naturalization have power to compel the alien to submit to an *additional* examination under oath with respect to the same subject matter?

It is, of course, fundamental that a person cannot be convicted of perjury unless the oath under which he testified falsely is authorized by law (*United States* v. *Curtis*, 107 U. S. 671; *United States* v. *George*, 228 U. S. 14; *Williamson* v. *United States*, 207 U. S. 425).

The Nationality Act contains express provisions requiring a person seeking citizenship to file a declaration of intention under oath (8 U. S. C. Sec. 731) and a petition under oath (8 U. S. C. Sec. 732), and to submit to an examination under oath in a preliminary hearing *after* the petition has been filed (8 U. S. C. Sec. 733). But the Act contains no provision for the preliminary examination under oath here involved, which was held *prior* to the filing of a petition.

The pre-petition examination on which the third count is founded was held pursuant to an administrative regulation (8 C. F. R. Sec. 370.8). Our contention is that there is no statutory basis for this regulation, for the following reasons:

1. The express statutory provisions for the administration of oaths in connection with the declaration of intention (8 U. S. C. Sec. 731), the petition (8 U. S. C. Sec. 732)

and the post-petition hearing (8 U. S. C. Sec. 733) show a legislative intention that these are to be the only oaths which a person seeking citizenship must make.

2. The special statutory provision for pre-petition examinations for members of the Armed Forces seeking citizenship (8 U. S. C. Sec. 724) shows a legislative intention not to authorize pre-petition examinations in the case of aliens who are not members of this special class.

3. The departmental regulation here involved authorizes a pre-petition examination under oath with respect to qualifications for citizenship which duplicates the post-petition hearing under oath expressly required by Congress in 8 U. S. C. Section 733. The regulation adds an obligation not provided for by Congress and is plainly inconsistent with the statute. Hence, the regulation cannot be sustained under the Commissioner's rule-making power. (*Williamson* v. *United States*, 207 U. S. 425; *United States* v. *George*, 228 U. S. 14. See: *United States* v. *Smull*, 236 U. S. 405; *United States* v. *Morehead*, 243 U. S. 607.)

The question whether an alien seeking citizenship may, by departmental regulation, be required to submit to a pre-petition examination under oath in addition to the post-petition examination under oath expressly provided for in 8 U. S. C. Section 733 is one which has never been passed upon by this Court.

A final determination of the question is needed because the regulation here involved affects the administration of the naturalization laws in all cases of persons seeking citizenship, and particularly because the regulation makes them liable to criminal prosecution for perjury. Both the power of the Commissioner and the rights of those entitled to apply for citizenship should not be left in doubt.

The Court of Appeals recognized the seriousness of the question, to which it devoted more than eight pages of its opinion (248-256). The opinion further suggests that the Court was not completely free from doubt. It points

to "the implications which might be drawn from" the history of the legislation favorable to petitioner (254), but goes on to discuss other facts leading the Court to a contrary conclusion, even though those facts were admittedly "not necessarily compelling" (256). That an important and substantial question has survived the judgment of the Court of Appeals is further evident from the fact that the Court stayed issuance of the mandate and continued petitioner on bail pending this application.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record upon which its said decision and judgment were made, and that said decision and judgment of the Court of Appeals may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem just and proper.

And your petitioner will ever pray, etc.

Dated: January 18, 1951.

SIDNEY E. COHN,
PAUL O'DWYER,
Of Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM 1950

No. ....

MICHAEL OBERMEIER,

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against

UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

OPINION BELOW

The opinion below has not yet been reported.

II

JURISDICTION

Petitioner seeks review by certiorari pursuant to Title 28, United States Code, Section 1254. The date of the decision and judgment sought to be reviewed is December 20, 1950.

III

STATEMENT OF THE CASE

A summary statement of the case has been given in the foregoing petition for the writ of certiorari, and for brevity the statement is not repeated here.

IV

SPECIFICATIONS OF ERROR

The Court of Appeals erred in holding—

(a) That there was statutory authority for the administration of the oath alleged in Count Three of the indictment upon which petitioner's conviction was based.

(b) That the evidence was sufficient in law to establish that petitioner made the false statement alleged in the indictment.

(c) That the evidence was sufficient in law to establish that an oath was administered to petitioner.

V

ARGUMENT

A. Petitioner's conviction cannot stand unless there was statutory authority for the oath alleged in Count Three of the indictment.

This proposition, of course, was not disputed by the Government or by the Court of Appeals. Indeed, that Court, in its opinion per Judge Frank, declared (248-249):

> "Defendant further contends, however, that in any case, he committed no crime, because the oath was administered to him during a proceeding in which there was no statutory authority to administer an oath. If so, Obermeier did not commit perjury by then swearing falsely. For the Supreme Court has held that false

statements under oath 'before one who has no legal authority to administer oaths of a public nature, or before one who * * * [is] authorized to administer some kinds of oaths, but not the one which is brought in question, cannot amount to perjury at common law, or subject the party taking it to prosecution for the statutory offense of willfully false swearing * * *. The oath must be permitted or required, by at least the laws of the United States, and be administered by some tribunal, officer, or person authorized by such laws to administer oaths in respect of the particular matters to which it relates.'" (Citing *United States* v. *Curtis*, 107 U. S. 671, 672-673; *United States* v. *George*, 228 U. S. 14, 21; *Williamson* v. *United States*, 207 U. S. 425, 458-460; *Dwyer* v. *United States*, 170 Fed. 160, 166.)

B. The oath in question was administered in a preliminary examination held prior to the filing of a petition, not in a post-petition hearing authorized by 8 U. S. C. Section 733.

This fact is also undisputed, as the Court below found when it stated (249-250):

"Here, the government, in its brief, distinguishes between (1) a 'preliminary examination' held 'before filing the petition for naturalization' and (2) a 'preliminary hearing' held after the petition has been filed. Had the examination on June 6, 1946 been made in connection with a petition then pending, an oath would have been explicitly authorized by the Nationality Act, and the regulations made thereunder. But the government concedes (and Dillon, the examiner, so testified) that, on June 6, 1946, when Obermeier made this statement, no petition for his naturalization was pending—since his petition, previously filed, had then been dismissed—and that the hearing was a pre-petition hearing under 8 C. F. R. 370.8.

"The question presented by this Count, then, is whether the examiner had legal authority to administer an oath to Obermeier in such a preliminary examination."

C. The Nationality Act of 1940 shows on its face that Congress did not authorize a pre-petition examination under oath of persons seeking citizenship.

The provisions of the Nationality Act prescribing the steps which a person seeking citizenship must take to establish his qualifications for citizenship are clear and explicit. Section 731 of Title 8 of the Code expressly requires an alien seeking naturalization to file a declaration of intention under oath in which he must swear, among other things, that he is not a member of a subversive organization. Section 732 expressly requires the alien to file a sworn petition containing, among other things, the same statement. Section 733 expressly requires the alien, after filing his petition, to submit to an examination under oath in a preliminary hearing before a designated examiner with power to report to the Court and to be examined "concerning any matter touching or in any way affecting * * * (his) admissibility * * * for naturalization".

The Act contains no provision for a pre-petition examination under oath of applicants for citizenship with respect to their qualifications. The omission to enact such a provision—taken in conjunction with the clear and express provisions requiring declarations of intention under oath, petitions under oath and post-petition hearings under oath—manifests a Congressional intention that applicants for citizenship should not be required to submit to a pre-petition examination under oath.

This conclusion is fortified by the fact that when Congress intended to authorize a pre-petition examination, it did so in express terms and limited it to the special case of members and former members of the Armed Forces (8 U. S. C. Secs. 724, 724A). For this there was a particular reason. In the case of the Armed Forces, Congress in 1918[1] had eliminated the requirements of a declaration of

[1] Act of May 9, 1918, ch. 69, 40 Stat. 542.

intention under oath, a certificate of arrival and residence within the jurisdiction of the Court (8 U. S. C. Sec. 724). Because these ordinary requirements of the naturalization process were dispensed with, Congress authorized a pre-petition examination as a special "safeguard".[2] Accordingly, Congress expressly provided in such cases that "before filing the petition for naturalization", the alien and his witnesses must "have appeared before and been examined by a representative of the service" (8 U. S. C. Sec. 724).

These are the only statutory provisions for a pre-petition examination. The omission of similar provisions for aliens not connected with the Armed Forces compels the conclusion that Congress did not intend to authorize pre-petition examinations in such cases.

D. The legislative history of Section 733 supports the conclusion that the only administrative examination under oath authorized by law is to be held *after* the filing of the petition.

Section 733 was first enacted as the Act of June 8, 1926, c. 502, 44 Stat. 709, and has remained substantially unchanged since its original enactment.[3]

The practice in respect to administrative examinations prior to the 1926 Act is set forth in the Annual Report of the Commissioner of Naturalization for the Fiscal Year Ended June 30, 1925. In that report the Commissioner described the procedure, after the alien has filed his application blank for a certificate of arrival, as follows:

> "The applicant is then notified to appear with two witnesses and submit to the administrative examina-

[2] Senate Report No. 388, 65th Cong., 2nd Sess., to accompany H. R. 3132, which became the Act of May 9, 1918.

[3] The change in the method of designating the examiners who are to hold the post-petition hearings under that section is not material here.

> tion preliminary to the filing of his petition. In some instances the petition is filed before this examination is made." [4]

Although the Regulations did not provide that this examination was to be under oath,[5] the examiners made reports to naturalization courts on the basis of this examination which the courts customarily followed.[6]

To relieve the courts of the burden of conducting examinations of aliens and their witnesses in court,[7] the Commissioner in his 1925 report recommended, as the Court below stated, "legislation expressly authorizing an oath in an administrative, pre-petition examination" (253).

Congress, however, did not adopt this recommendation. Instead, Congress enacted the Act of June 8, 1926, which specifically provided for an administrative examination under oath to be held *after* the filing of the petition. It did this despite the fact that the Commissioner's report showed that the usual practice was to hold the examination before the petition was filed and despite the fact that in the Act of May 9, 1918, Congress had, as we have seen, already authorized a pre-petition examination in the special case of members of the Armed Forces.

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[4] Annual Report of the Commissioner of Naturalization, Fiscal Year Ended June 30, 1925, p. 1.

[5] Naturalization Laws and Regulations, June 15, 1924, Rule 3, subd. B, par. 2.

[6] "For years the attitude of the courts to recognize and accept the report of the naturalization examiner at the hearing of petitions for naturalization has been growing * * *. For years the records of each case have been carefully made up by the examiner at the time of the administrative examination of the applicant and his two witnesses * * *. Findings are made by the examiner in each case. The courts have no specific statute authorizing them to accept these as findings in the absence of statutory authority." Annual Report of the Commissioner of Naturalization, Fiscal Year Ended June 30, 1925, p. 18.

[7] See: H. Rept. 1320, 69th Cong., 1st Sess., to accompany S. 4251.

The Court of Appeals found this legislative history to be as we have stated it. The Court said (253-254):

> "But in 1926, Congress, despite a recommendation from the Commissioner for legislation expressly authorizing an oath in an administrative, pre-petition examination, amended the Act of 1906 to provide for 'preliminary hearings upon petitions for naturalization'—i.e., after the petition has been filed. This was done after Congress had expressly provided in 1918, for pre-petition hearings to expedite the naturalization of a special class of aliens—those who were members or prospective members of the United States armed forces in World War I (a provision which was substantially re-enacted for aliens similarly situated in World War II.) And in the Nationality Act of 1940, re-codifying the naturalization laws, 8 U.S.C. § 733 which provides for post-petition hearings in the usual cases, was retained with minor changes not here relevant."

This legislative history points unerringly to the conclusion that Congress refused to authorize a pre-petition examination under oath.

E. The regulation authorizing a pre-petition examination under oath is inconsistent with the statute.

Both the pre-petition examination under oath and the post-petition hearing under oath involve the examination of the same person, namely, the alien seeking citizenship, in respect to the same subject-matter, namely, his qualifications for citizenship.[8]

Congress has provided for *one* such examination—the post-petition hearing under 8 U. S. C. Section 733. The

[8] 8 C.F.R. Section 370.8, which purports to authorize the pre-petition examination here involved, provides that the examination shall be concerned with the alien's "qualifications to become a naturalized citizen". Section 733 provides that the preliminary hearing after the petition has been filed shall be "concerning any matter touching or in any way affecting the admissibility of any petitioner for naturalization".

decisions of this Court are clear that the rule-making power of the Commissioner does not authorize him to require an applicant for citizenship to make two oaths in respect to the very same subject-matter as to which Congress has authorized but one.[9]. Congress provided "the exact measure of the obligation" [10] to be met by those seeking citizenship, namely, to testify under oath in a post-petition hearing before a "designated examiner" as required by Section 733 of Title 8. The regulation imposing the additional obligation to testify under oath with respect to the same matters in a pre-petition hearing before a "preliminary examiner" changes the requirement of Section 733. It is inconsistent with it, and is not justified by the provisions of Section 727(b) granting authority to promulgate regulations "*necessary* to carry into effect the provisions of this sub-chapter".[11]

F. The arguments advanced by the Court of Appeals for its conclusion that the oath here in question had statutory authority are unsound.

The Court below fell into fundamental error in its approach to the problem before it.

It began its analysis of the question by postulating the premise that "a regulation is presumptively valid, and one who attacks it has the burden of showing its invalidity" (250). This premise is, to be sure, applicable to civil cases and other situations where the regulation is not relied upon as the basis for a conviction of crime. But where the regulation is sought to be made the foundation of criminal liability, there can be no such presumption or burden. For any such presumption and burden would be in direct con-

[9] *United States* v. *George*, 228 U. S. 14; *Williamson* v. *United States*, 207 U. S. 425. See *United States* v. *Smull*, 236 U. S. 405; *United States* v. *Morehead*, 243 U. S. 607.

[10] *United States* v. *George*, supra, at p. 19.

[11] See the cases cited in Footnote 9, supra.

flict with the basic principles that "where the charge is of crime, it must have clear legislative basis"[12] and that "statutes creating crimes are to be strictly construed in favor of the accused".[13] And it should be observed that none of the cases cited by the Court of Appeals in support of its premise presented a situation where criminal liability was predicated upon the regulation in question.[14]

Apart from this presumption, the Court of Appeals further argues:

1. That the general language of 8 U. S. C. Section 727(b) authorizes the Commissioner to require pre-petition hearings under oath (254-255).

2. That since 1929 it has been the practice to hold pre-petition hearings under oath and that Congress, with knowledge of that practice, never enacted any legislation to change it (255-256).

Neither of these arguments is valid.

8 U. S. C. Section 727(b) reads as follows:

> "The Commissioner, with the approval of the Attorney General, shall make such rules and regulations as may be necessary to carry into effect the provisions of this subchapter and is authorized to prescribe the scope and nature of the examination of petitioners for naturalization as to their admissibility to citizenship for the purpose of making appropriate recommendations to the naturalization courts. Such examination shall be limited to inquiry concerning the applicant's residence, good moral character, understanding of and attachment to the fundamental principles of the Constitution of the United States, and other qualifications to become a naturalized citizen as required by law, and shall be uniform throughout the United States."

[12] *United States* v. *George*, 228 U. S. 14, 22. See also *Viereck* v. *United States*, 318 U. S. 236; *United States* v. *Eaton*, 144 U. S. 677.

[13] *United States* v. *Resnick*, 299 U. S. 207, 209.

[14] See *Boske* v. *Comingore*, 177 U. S. 459; *United States* v. *Watkins*, 173 F. (2d) 599; *Carter* v. *Forrestal*, 175 F. (2d) 364; *Jacob Siegel* v. *F.T.C.*, 327 U. S. 608.

The section, on its face, does two things:

1. It grants the Commissioner power to make rules and regulations, with the limitation that such rules and regulations must be "*necessary* to carry into effect the provisions of this subchapter".

2. It authorizes him "to prescribe the scope and nature of the examination of petitioners for naturalization" with two limitations. The first of these is that "such examination shall be limited to inquiry concerning the applicant's * * * qualifications to become a naturalized citizen as required by law". The second is that "such examination * * * shall be uniform throughout the United States".

We have already shown in Point E of this brief[15] that the power of the Commissioner to make rules and regulations does not authorize him to add to the obligation imposed by Congress by requiring a pre-petition examination under oath *in addition to* the post-petition examination under oath for which Congress has expressly provided in Section 733.

Nor, we submit, does the provision authorizing the Commissioner to "prescribe the scope and nature of the examination of petitioners" empower him to require applicants for citizenship to submit to two examinations in respect to the very subject-matter as to which Congress has authorized but one. Rather, it is designed to empower him to "*prescribe the scope and nature*" of the one examination for which Congress made express provision in Section 733. This is shown by the following:

1. The provision does not read "The Commissioner * * * is authorized to require applicants to submit to a pre-petition examination". Instead it reads: "The Commissioner * * * is authorized to *prescribe the scope and nature* of *the* examination of petitioners * * * ".

[15] Supra, pages 15-16.

2. The use of the definite article *"the* examination" shows that the provision refers to a particular examination provided for elsewhere.

3. The purpose of the examination referred to, namely, "making appropriate recommendations to the naturalization courts", is the very purpose of the post-petition examination expressly provided for by 8 U. S. C. Section 733. And the record shows that the pre-petition examination here involved was not for that purpose (68-69).

4. In prescribing the "scope and nature" of "such examination", the Commissioner must limit the same "to inquiry concerning the applicant's * * * qualifications to become a naturalized citizen as required by law"—which is the very subject-matter of the post-petition examination required by Section 733.

5. Section 727 as a whole deals with matters of administration and procedural detail.[16] The substantive steps in the naturalization process (sworn declaration of intention, sworn petition and post-petition hearing under oath) were specifically provided for by Congress in separate later sections of the Act (8 U. S. C. Secs. 731, 732, 733). It cannot, therefore, be supposed that Congress intended by the procedural provisions of Section 727(b) to authorize so important an additional substantive step in the naturalization process as a pre-petition hearing under oath.

6. The legislative history of Section 727(b) shows that its purpose was simply to assure uniformity throughout the United States of the post-petition examination provided for by Section 733. Section 727(b) was first enacted as part of the Nationality Act of 1940.[17] That Act was drafted

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[16] For example, as the Court below specifically found, subdivision (e) of Section 727 does not authorize the holding of any examination under oath but "merely states what kind of persons may be authorized to administer oaths in naturalization matters" (254).

[17] Act of October 14, 1940, c. 876, Title I, subchap. III, Section 327(b), 54 Stat. 1150.

as the result of a study by revisers, who embodied their conclusions and recommendations in a lengthy report.[18] The revisers' comment on Section 727(b)[19] clearly shows the following:

(a) The purpose of giving the Commissioner the power to "prescribe the scope and nature of *the* examination" was to insure that "such examination * * * shall be uniform throughout the United States".

(b) Only *one* examination was referred to.

(c) This examination was the post-petition hearing required by Section 733, which was to be held before a designated examiner empowered to make recommendations to the naturalization court. Thus, the revisers stated:[20]

> "While the statutory authority which is now given naturalization examiners to conduct preliminary hearings, take testimony, and make recommendations to the court for the admission or denial of petitions filed in the United States District Courts, is a move in the direction of a more uniform naturalization law, a test which would be the same in every *court* through the United States would give a tremendous impetus in approaching the required uniformity of procedure" (italics supplied).

The second argument upon which the Court of Appeals rested its decision that the oath here involved has statutory authority is that "the regulations since 1929 have authorized pre-petition examinations under oath. The practice of holding pre-petition examinations was continually reported to Congress by the Commissioner, while that body was repeatedly amending the Nationality Act, including Section 733, without any change relating to this practice" (255-256).

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[18] Codification of the Nationality Laws of the United States, House Committee Print, 76th Cong., 1st Sess. (1939).

[19] Section 326(b) in the revisers' draft.

[20] Codification of the Nationality Laws of the United States, House Committee Print, 76th Cong., 1st Sess. (1939) at p. 38.

This argument is, we respectfully submit, without merit for the following reasons:

1. It is perfectly clear from the face of the Nationality Act and its legislative history, as we have shown above, that Congress did not intend to authorize the holding of pre-petition examinations under oath. Administrative practice which conflicts with this clear intent can be given no weight in determining the proper construction of the Act. "The limits of the power to issue regulations are well settled. * * * They may not extend a statute or modify its provisions." [21] Even where, after a long continued and consistent course of administrative practice, Congress has re-enacted a statute without change, presumably with that practice in mind, the practice will be disregarded in interpreting the statute when it conflicts with the intent of Congress as shown by the statutory provisions themselves.[22]

2. The Court of Appeals has cited no authority, and we have been unable to find any, to show that the Commissioner ever reported to Congress the practice of holding pre-petition examinations *under oath.*

G. The evidence does not establish as a matter of law that petitioner made the false statement alleged in the indictment or that, if he made it, he did so under oath.

As we have shown in the statement of facts in our petition (supra, p. 5), no stenographer was present at the time that petitioner was questioned by Mr. Dillon, nor were the questions and answers taken down in writing (78-80). On cross-examination, Mr. Dillon frankly admitted that his testimony that petitioner had stated that he had never been a member of the Communist Party was

[21] *Campbell* v. *Galeno Chemical Co.*, 281 U. S. 599, 610.

[22] See *Koshland* v. *Helvering*, 298 U. S. 441, 445-447. Compare *McGrath* v. *Kristensen*, 95 L. Ed. (Adv. Op.) 165 with *Benzian* v. *Godwin*, 168 F. (2d) 952.

his "interpretation" or "conclusion" as to the meaning of petitioner's "lengthy explanations". We quote from the record (72-74):

> "Q. You found him willing to not only answer but to expand on his views, isn't that so? A. Yes, that is true.
>
> Q. And he did, when you were questioning him about his affiliations and about what organizations he belonged to, he did expand on his views, it was not merely a terse yes or no, was it? A. That is right.
>
> Q. He expanded on his views? A. Yes.
>
> Q. And you abbreviated the expansion to what you understood to be his answer? A. That is right.
>
> Q. *So what you have here given in your report is your interpretation actually of what his answer meant?* A. *That is true.*
>
> * * * * * *
>
> Q. And as a result of what he told you you came to the *conclusion* that what he meant was that he was not a member of the Communist Party, is that right? A. *That was my conclusion, yes.*
>
> Q. That was your conclusion from these lengthy explanations, is that right? A. Yes.
>
> * * * * * *
>
> Q. When you began to talk about his affiliations to him he began to give lengthy explanations to you as to his problems and the problems of the people in the hotel and restaurant industry during the period of time that he was in America; is that so? A. That is right.
>
> Q. And he began to tell you about his affiliations one with the other and the freedom of speech and things of that kind? A. That is true.
>
> Q. *And as a result of his explanations you came to the conclusion that his answer meant that he was not a member of the Communist Party? A. That was my* conclusion" (italics supplied).

It is true that on direct examination Dillon worded his testimony to give the impression that he was reporting petitioner's answer. The principle, however, that Dillon's testimony must be taken as qualified on cross-examination is elementary and needs no citation of authority.

Dillon's interpretations and conclusions are not proof of what petitioner actually said. "If a witness cannot give the words of the parties, he may, undoubtedly, be permitted to state the substance of what was said. He ought not, however, be allowed to substitute his inference from what was said."[23] As stated in *O'Neil* v. *United States*, 8 Cir., 19 F. (2d) 322, 325:

> "It is a well-settled principle of the law of evidence that a witness who has heard a statement or conversation should not be permitted to state his conclusions as to what was stated or admitted. * * * The summary prepared by Manning and introduced in evidence in the instant case was neither a verbatim transcript of what O'Neil said, nor the substance and effect of what he said. It was not O'Neil's statement, but Manning's statement of the conclusions and deductions arrived at by him from the conversation between O'Neil and the narcotic officers. It follows that its admission in evidence was erroneous."

Whatever Dillon's interpretations and conclusions may be worth, they surely may not be used as the sole basis for finding guilt beyond a reasonable doubt of the charge that petitioner made a specific false statement.

Finally Mr. Dillon admitted that he made "no written record" of administering an oath and that he did not have any "distinct recollection" of doing so (79-80). He said:

> "Q. Outside of your practice to do it in every case you have no distinct recollection of having called Obermeier to raise his right hand and swear to tell the truth on this day, is that right? A. That is true.
> Q. Is that true, Mr. Dillon? A. That is true" (80).

It is scarcely necessary to point out the danger of predicating a conviction for perjury upon an oral statement allegedly under oath where no written record was made of the administration of the oath or of the alleged perjurious statement. In this connection we call the Court's attention to Regulation 370.9, which follows immediately after the

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[23] *Hewitt* v. *Clark*, 91 Ill. 605, 608.

regulation purporting to authorize the preliminary examination here involved, and which provides:

> *"Material statements of applicants and witnesses to be in writing, under oath.* Material statements of applicants for naturalization * * * and their witnesses, shall, where deemed necessary by the naturalization officer, be taken down in writing and under oath and signed by the applicant or witness."

Yet, in the case at bar, the petitioner has been sentenced to two years' imprisonment on the third count for an alleged perjury where no written record of the administration of an oath, or of the question asked, or of petitioner's answer to it was made—and this despite the fact that the very part of the regulations under which the preliminary examination of the petitioner was conducted provides for a written record where deemed necessary.

Dated: New York, January 18, 1951.

SIDNEY E. COHN,
PAUL O'DWYER,
Of Counsel for Petitioner

APPENDIX "A" TO BRIEF IN SUPPORT OF PETITION

The relevant sections of the Nationality Act of 1940, Title 8, United States Code are as follows:

"§ 724. Persons serving in armed forces of United States.

"(a) A person, including a native-born Filipino, who has served honorably at any time in the United States Army, Navy, Marine Corps, or Coast Guard for a period or periods aggregating three years and who, if separated from such service, was separated under honorable conditions, may be naturalized without having resided, continuously immediately preceding the date of filing such person's petition, in the United States for at least five years and in the State in which the petition for naturalization is filed for at least six months, if such petition is filed while the petitioner is still in the service or within six months after the termination of such servce.

"(b) A person filing a petition under subsection (a) of this section shall comply in all respects with the requirements of this subchapter except that—

"(1) No declaration of intention shall be required;

"(2) No certificate of arrival shall be required;

"(3) No residence within the jurisdiction of the court shall be required;

"(4) Such petitioner may be naturalized immediately if the petitioner be then actually in any of the services prescribed in subsection (a) of this section, and if, before filing the petition for naturalization, such petitioner and at least two verifying witnesses to the petition, who shall be citizens of the United States and who shall identify petitioner as the person who rendered the service upon which the petition is based, have appeared before and been examined by a representative of the Service. * * *

"§ 727. Administration of naturalization laws; rules and regulations; instruction in citizenship; forms;

oaths; depositions; documents in evidence; photographic studio.

"(a) The Commissioner, or, in his absence, a Deputy Commissioner, shall have charge of the administration of the naturalization laws, under the immediate direction of the Attorney General, to whom the Commissioner shall report directly upon all naturalization matters annually and as otherwise required.

"(b) The Commissioner, with the approval of the Attorney General, shall make such rules and regulations as may be necessary to carry into effect the provisions of this subchapter and is authorized to prescribe the scope and nature of the examination of petitioners for naturalization as to their admissibility to citizenship for the purpose of making appropriate recommendations to the naturalization courts. Such examination shall be limited to inquiry concerning the applicant's residence, good moral character, understanding of and attachment to the fundamental principles of the Constitution of the United States, and other qualifications to become a naturalized citizen as required by law, and shall be uniform throughout the United States. * * *

"(e) Members of the Service may be designated by the Commissioner or a Deputy Commissioner to administer oaths and to take depositions without charge in matters relating to the administration of the naturalization and citizenship laws. In cases where there is a likelihood of unusual delay or of hardship, the Commissioner or a Deputy Commissioner may, in his discretion, authorize such depositions to be taken before a postmaster without charge, or before a notary public or other person authorized to administer oaths for general purposes. * * * "

"§ 731. Declaration of intention

"An applicant for naturalization shall make, under oath before, and only in the office of, the clerk of court or such clerk's authorized deputy, regardless of the place of residence in the United States of the applicant, not less than two nor more than seven years at least prior to the applicant's petition for naturalization, and after the applicant has reached the age of eighteen

years, a signed declaration of intention to become a citizen of the United States, which declaration shall be set forth in writing, in triplicate, and shall contain substantially the following averments by such applicant: * * *

"(14) I am not an anarchist, nor a disbeliever in or opposed to organized government, nor a member of or affiliated with any organization or body of persons teaching disbelief in or opposition to organized government. * * *"

"§ 732. Petition for naturalization

"(a) An applicant for naturalization shall, not less than two nor more than ten years after such declaration of intention has been made, make and file in the office of the clerk of a naturalization court, in duplicate, a sworn petition in writing, signed by the applicant in the applicant's own handwriting, if physically able to write, and duly verified by witnesses, which petition shall contain substantially the following averments by such applicant. * * *

"(16) I am not an anarchist, nor a disbeliever in or opposed to organized government, nor a member of or affiliated with any organization or body of persons teaching disbelief in or opposition to organized government.

"(17) I am attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States. * * *"

"§ 733. Hearing of petitions; preliminary hearings

"(a) The Commissioner or a Deputy Commissioner shall designate members of the Service to conduct preliminary hearings upon petitions for naturalization to any naturalization court and to make findings and recommendations thereon to such court. For such purposes any such designated examiner is hereby authorized to take testimony concerning any matter touching or in any way affecting the admissibility of any petitioner for naturalization, to subpoena witnesses, and to administer oaths, including the oath of the petitioner to the petition for naturalization and the oath of petitioner's witnesses. * * *"